# Before the
# Administrative Hearing Commission
# State of Missouri

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| FRED WEBER, INC., | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | No. 12-0252 RS |
| | ) | |
| DIRECTOR OF REVENUE, | ) | |
| | ) | |
| Respondent. | ) | |

**DECISION**

Fred Weber, Inc., ("Fred Weber") is entitled to a sales tax refund.

**Procedure**

On February 13, 2012, Fred Weber filed its complaint alleging that it was entitled to a refund of $139,654.62 for sales tax that it paid to the Director of Revenue ("the Director") for the time period between October 2008 and September 2009. On March 16, 2012, the Director filed his answer.

We held a hearing on May 21, 2013. Apollo Carey and Anthony Soukenik, of Sandberg Phoenix & von Gontard, P.C., represented Fred Weber. Christopher Fehr and Spencer Martin represented the Director. This case became ready for our decision on September 12, 2013, when the last written argument was filed.

## Findings of Fact

Construction of an Asphalt Pavement

1. An asphalt pavement begins with a dirt substrate. A construction crew levels and grades the dirt, ensures that it is stable, and assures that the drainage is adequate.

2. The construction crew then places a rock aggregate base on top of the dirt substrate. Rock aggregate is a mixture of crushed rock, sand, and gravel. The composition of the rock aggregate, the size of the rock particles, and the depth of the rock aggregate layer all depend on the intended use of the pavement and vary from job to job.

3. The construction crew levels, grades, and compacts the rock aggregate using heavy machinery including ten-ton steel rollers and graders. The crew than ensures that the rock aggregate has reached the density specified in the site design.

4. The construction crew then pours the hot mix asphalt. The hot mix asphalt does not mix with the rock aggregate.

5. Hot mix asphalt is a mixture of between 90 and 95 percent rock aggregate and five to ten percent asphaltic oil. Asphaltic oil is a dense petroleum oil.

6. The hot mix asphalt is poured at a temperature of 300 degrees. The construction crew levels, grades, and compacts the hot mix asphalt using heavy machinery including rollers and graders. The crew must complete the compacting before the hot mix asphalt cools to 175 degrees.

7. When the temperature of the hot mix asphalt drops to 175 degrees, it is no longer suitable for grading or compacting.

Fred Weber's Asphalt Operations

8. Fred Weber is a Missouri corporation. Among other things, Fred Weber operates manufacturing facilities, quarries, and asphalt plants.

9. As part of its business, Fred Weber sold rock aggregate and hot mix asphalt to contractors for use in creating asphalt pavement. The two paving contractors at issue in this case are Byrne and Jones Enterprises and Leritz Inc. ("the Paving Contractors").

10. Fred Weber loaded the rock aggregate onto dump trucks at one of its quarries and delivered it to construction sites designated by the Paving Contractors. The Paving Contractors transferred the rock aggregate from Fred Weber's dump trucks to their equipment.

11. Fred Weber created the hot mix asphalt by heating rock aggregate. After the rock aggregate was heated, Fred Weber added asphaltic oil. The resulting temperature of the hot mix asphalt was between 300 and 375 degrees. Fred Weber conducted this operation at one of its asphalt processing plants.

12. Fred Weber then placed the hot mix asphalt in dump trucks and delivered it to construction sites designated by the Paving Contractors. The Paving Contractors transferred the hot mix asphalt from Fred Weber's dump trucks to their equipment.

13. The Paving Contractors did not modify, heat, or alter the rock aggregate or the hot mix asphalt except by pouring, grading, leveling, and compacting it.

14. The process by which Fred Weber and the Paving Contractors created asphalt pavement was time sensitive. Fred Weber created the hot mix asphalt, kept it at a temperature of 300 degrees, and delivered it to the Paving Contractors at that temperature. The Paving Contractors then promptly used the hot mix asphalt before it cooled to a temperature of 175 degrees.

15. Fred Weber sold $2,634,362.37 in materials (rock aggregate and hot mix asphalt) to the Paving Contractors between October 2008 and September 2009 for construction of new streets, parking lots, and resurfacing.

Proceedings Before the Director

16. On November 28, 2011, Fred Weber filed an application for a sales tax refund of $139,654.62 for the time period between October 2008 and September 2009. That amount equaled the sales tax Fred Weber paid on the sale of rock aggregate and hot mix asphalt to the Paving Contractors for use in creating asphalt pavements.

17. On December 11, 2011, the Director denied Fred Weber's request for a refund.

**Conclusions of Law**

This Commission has jurisdiction over appeals from the Director's final decisions.[1] Fred Weber has the burden to prove that it is not liable for the amount that the Director assessed.[2] Our duty in a tax case is not merely to review the Director's decision, but to find the facts and to determine, by the application of existing law to those facts, the taxpayer's lawful tax liability for the period or transaction at issue.[3]

Section 144.020.1[4] imposes a sales tax on all sellers for the privilege of engaging in the business of selling tangible personal property in this state. Fred Weber claims a sales tax exemption under § 144.054.2,[5] which allows an exemption for:

> In addition to all other exemptions granted under this chapter, there is hereby specifically exempted from the provisions of sections 144.010 to 144.525 and 144.600 to 144.761, and from the computation of the tax levied, assessed, or payable under sections 144.010 to 144.525 and 144.600 to 144.761, electrical energy and gas, whether natural, artificial, or propane, water, coal, and energy sources, **chemicals**, machinery, equipment, and **materials used or consumed in the manufacturing, processing, compounding, mining, or producing of any product**, or used or consumed in the processing of recovered materials, or used in research and development related to manufacturing, processing, compounding,

[1]Section 621.050.1. Statutory references are to RSMo 2000, unless otherwise noted.
[2]Sections 136.300.1 and 621.050.2.
[3]***J.C. Nichols Co. v. Director of Revenue***, 796 S.W.2d 16, 20-21 (Mo. 1990).
[4] RSMo Supp. 2013.
[5] RSMo Supp. 2013.

> mining, or producing any product. The exemptions granted in this subsection shall not apply to local sales taxes as defined in section 32.085 and the provisions of this subsection shall be in addition to any state and local sales tax exemption provided in section 144.030.

(Emphasis added).

A statute imposing a tax is strictly construed in favor of the taxpayer and against the taxing authority.[6] However, the Missouri Supreme Court has declared that the following rules of construction apply to tax exemptions:[7]

> Tax exemptions are strictly construed against the taxpayer. … An exemption is allowed only upon clear and unequivocal proof, and doubts are resolved against the party claiming it. … Exemptions are interpreted to give effect to the General Assembly's intent, using the plain and ordinary meaning of the words.

The taxpayer has the burden to show that it qualifies for an exemption.[8] "Absent statutory definition, words used in statutes are given their plain and ordinary meaning with help, as needed, from the dictionary."[9]

Under § 144.054.2, we must address three questions in determining whether Fred Weber is entitled to an exemption:

1. Whether rock aggregate and hot mix asphalt are chemicals or materials;
2. Whether the Paving Contractors used or consumed the rock aggregate and the hot mix asphalt in the manufacturing, processing, compounding, mining, or producing of an asphalt pavement; and
3. Whether the asphalt pavement constitutes "any product."

[6] ***President Casino, Inc. v. Director of Revenue***, 219 S.W.3d 235, 239 (Mo. 2007).
[7] ***Branson Properties USA v. Director of Revenue***, 110 S.W.3d 824, 825-26 (Mo. banc 2003).
[8] *Id*. at 825.
[9] ***American Healthcare Management v. Director of Revenue***, 984 S.W.2d 496, 498 (Mo. banc 1999).

I. Chemicals or Materials

Fred Weber contends that asphaltic oil, a component of the hot mix asphalt, is a "chemical" under 144.054.2. Fred Weber also argues that the rock aggregate and hot mix asphalt are "materials" under § 144.054.2.

A "chemical" is "a substance … used for producing a chemical effect."[10] Fred Weber produced no evidence that the asphaltic acid has any chemical effect on the rock aggregate or any other substance. We find that asphaltic oil is not a "chemical" under § 144.054.2.

The Missouri Supreme Court has defined "materials" as "either (1) the raw product from which something is made or (2) an apparatus necessary to make something."[11] It is undisputed that the Paving Contractors use rock aggregate and hot mix asphalt from Fred Weber to make asphalt pavement. We find that the rock aggregate and the hot mix asphalt, the raw materials from which an asphalt pavement is made, are "materials" under § 144.054.2.

II. Manufacturing, Processing, Compounding and Producing

Fred Weber contends that the Paving Contractors manufactured, processed, compounded, and produced an asphalt pavement.

A. Processing

Section 144.054.1(1) provides a specific definition of "processing:"

> any mode of treatment, act, or series of acts performed upon materials to transform or reduce them to a different state or thing, including treatment necessary to maintain or preserve such processing by the producer at the production facility[.]

In ***Aquila Foreign Qualifications Corp. v. Director of Revenue***,[12] the Missouri Supreme Court held that preparation of food in a convenience store was not "processing."[13] The Court

[10] WEBSTER'S THIRD NEW INT'L DICTIONARY UNABRIDGED 384 (1986).
[11] ***E & B Granite, Inc. v. Director of Revenue***, 331 S.W.3d 314, 318 (Mo. banc 2011).
[12] 362 S.W.3d 1, 3 (Mo. banc 2012).
[13] *Id*. at 5-6.

found that its interpretation of "processing" was guided by "the statutory maxim of *noscitur a sociis*—a word is known by the company it keeps."[14] The Court further held that "[t]he industrial connotations of ["processing" along with "manufacturing," "compounding," "mining," and "producing"] in section 144.054.2 indicate that the legislature did not intend 'processing' to include food preparation for retail consumption."[15] This case, unlike *Aquila*, deals with an industrial process.

We first consider whether the Paving Contractors performed an act or series of acts on the materials. The Paving Contractors used rollers, graders, and other machinery to pour, level, grade, and compact the rock aggregate and the hot mix asphalt. Thus, there was a series of acts performed on the materials.

The next question is whether the Paving Contractors "reduced" or "transformed" materials. We look to the dictionary for the meanings of these terms.

"Reduce" has two definitions in an industrial context:

> **1** … **b:** to concentrate or decrease the volume of (as crude petroleum) by removing light hydrocarbons by distillation … **4:** to undergo processing especially for commercial purposes[16]

The Paving Contractors' work did not involve decreasing the volume of crude petroleum of any other liquid. The second definition is circular and provides us no help. We therefore conclude that the Paving Contractors did not reduce the materials.

"Transform" is defined as

> **1 a:** to change completely or essentially in composition or structure … **b:** to change the outward form or appearance of[.17]

[14] *Id*. at 5.
[15] *Id*. at 5.
[16] WEBSTER'S THIRD NEW INT'L DICTIONARY UNABRIDGED 1905 (1986).
[17] *Id*. at 2427.

We find that the Paving Contractors transformed the materials. When the materials arrived at a construction site, they were in dump trucks, could be spread, and had no form or structure. After the Paving Contractors finished their work with the materials, they were changed into a smooth, immobile asphalt surface that could not be moved or altered except by destroying it. The structure of the materials and their outward form was changed from loose rock and oil to a solid surface. We conclude that the Paving Contractors transformed the materials into a different state. The Paving Contractors processed the hot mix asphalt and the rock aggregate.

B. Manufacturing

"Manufacturing" is "the alteration or physical change of an object or material in such a way that produces an article with a use, identity, and value different from the use, identity, and value of the original."[18]

Prior to being installed as part of an asphalt pavement, the rock aggregate and the hot mix asphalt were pourable and loose. They could be transported and used for any asphalt installation. After installation, the rock aggregate and hot mix asphalt no longer had individual identities. Those materials now constituted one single asphalt pavement. Consequently, these changes meet the definition of "manufacturing."

C. Compounding

"Compound" is "to put together (as elements, ingredients or parts) to form a whole[.]"[19] Here, the Paving Contractors put together the rock aggregate and the hot mix asphalt to form one asphalt pavement. The Paving Contractors thus compounded the rock aggregate and the hot mix concrete.

[18] ***Branson Props. USA LP v. Director of Revenue***, 110 S.W.3d 824, 826 (Mo. banc 2003), *quoting* ***Galamet, Inc. v. Director of Revenue***, 915 S.W.2d 331, 333 (Mo. banc 1996). The Director had adopted this same definition. 12 CSR 10-110.621(2)(D); 12 CSR 10-111.010(2)(E)(i).

[19] WEBSTER'S THIRD NEW INT'L DICTIONARY UNABRIDGED 466 (1986).

D. Producing

"Produce" is defined as "to give being, form, or shape to **:** make often from raw materials[.]"[20] The Paving Contractors gave a final form and shape to the rock aggregate and hot mix asphalt by combining them into a unified whole. The Paving Contractors therefore used the rock aggregate and hot mix asphalt to produce a final product.

E. The Director's Arguments

The Director attacks our decision in ***AAA Laundry & Linen Supply Co. v. Director of Revenue***.[21] We may easily dispense with that argument because our decisions are not precedential and we are not required to follow ***AAA Laundry***.[22] Further, the Missouri Supreme Court recently decided ***AAA Laundry v. Director of Revenue*** and reversed our prior decision.[23] Thus, we have no need to discuss whether and to what extent ***AAA Laundry*** was correctly decided.

The Director next argues that "processing" is contained within "manufacturing." In support of this argument, the Director cites ***Aquila***, ***Hudson Foods***[24] and ***Mid-America Dairymen***[25] In ***Hudson Foods*** and ***Mid-America Dairymen***, the Missouri Supreme Court held that "there is little to no difference between the terms 'processing' and 'manufacturing,' as a practical matter,"[26] and that "the meaning of the term 'processing' is ordinarily 'included within the meaning of the more general and inclusive term 'manufacturing.'"[27] The Missouri Supreme Court restated those holdings in ***AAA Laundry***: "'processing' and 'manufacturing' have concentric, if not identical, meanings."[28]

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[20] WEBSTER'S THIRD NEW INT'L DICTIONARY UNABRIDGED 1810 (1986).
[21] No. 11-2210 RS (April 18, 2013).
[22] ***Central Hardware Co. v. Director of Revenue***, 887 S.W.2d 593, 596 (Mo. banc 1994).
[23] No. SC93331 (March 11, 2014).
[24] 924 S.W.2d 277, 278 n.1 (Mo. banc 1996).
[25] 924 S.W.2d 280, 283 (Mo. banc 1996).
[26] 924 S.W.2d at 278 n.1.
[27] 924 S.W.2d at 283, *quoting* ***State ex rel. Union Elec. v. Goldberg***, 578 S.W.2d 921, 924 (Mo. 1979).
[28] Slip. op. at 6.

We analyzed "processing" and "manufacturing" as different terms in the preceding section and concluded that the Paving Contractors processed **and** manufactured asphalt pavement. Thus, even if "processing" and "manufacturing" are synonymous terms, as the Director argues, our decision in this case would not change.

***Aquila*** and its progeny also do not aid the Director here. ***Aquila***, ***AAA Laundry***, and ***Union Electric Co. v. Director of Revenue***[29] all stand for the same proposition: when the Missouri Supreme Court has previously held that an activity is not "manufacturing" under § 144.030.2, that activity will not be considered "processing" under § 144.054.2.[30] In ***Aquila*** and ***Union Electric***, the Missouri Supreme Court applied its prior decision in ***Brinker Missouri, Inc. v. Dir. of Revenue***,[31] which held that retail food operations did not constitute manufacturing under § 144.030.2, and held that retail food preparation was not "processing" under § 144.054.2. In ***AAA Laundry***, the Missouri Supreme Court applied its prior decision in ***Unitog Rental Services, Inc. v. Director of Revenue***,[32] which held that commercial laundry operations did not conduct "manufacturing" under § 144.030.2, and held that commercial laundering did not constitute processing under § 144.054.2. Here, there is no prior Missouri Supreme Court precedent stating that asphalt paving is not manufacturing under § 144.030.2, and thus no compelled result that asphalt paving is not "processing" under § 144.054.2.

Further, we find that, under § 144.054.2, "processing" and "manufacturing" have different definitions. In ***Aquila***, the Missouri Supreme Court held that the statutory definition of "processing" in § 144.054.1(1) is ambiguous.[33] The issue in ***Aquila*** was whether a convenience store was entitled to a sales tax exemption under § 144.054.2 on electricity purchased to prepare

[29] No. SC93083 (Mar. 11, 2014).
[30] ***AAA Laundry***, slip op. at 7-8; ***Union Electric***, slip op. at 8-9 (discussing ***Aquila***).
[31] 319 S.W.3d 433 (Mo. banc 2010).
[32] 779 S.W.2d 568 (Mo. banc 1989).
[33] 362 S.W.3d 1, 3 (Mo. banc 2012).

food.[34] The Missouri Supreme Court held that food preparation was not processing and that processing under § 144.054 has an industrial connotation as noted above.

In a footnote in ***Aquila***, the Court specifically stated that the definitions of "processing" under § 144.030.2 in prior Missouri Supreme Court cases such as ***Hudson Foods***[35] and ***Mid-America Dairymen***[36] "do not control the statutory definition of 'processing' under" § 144.054.1(1) and .2.[37] The Court also stated that those definitions provide "insight into the legislative intent of section 144.054.2."

The Director first argues that, under ***Aquila***, we should use the definitions in ***Hudson Foods*** and ***Mid-America Dairymen*** to define "processing" in § 144.054.2. The Director argues that the statutory definition in § 144.054.1(1) was taken from prior Supreme Court precedent and that the General Assembly intended to write the Court's prior definitions into statute and have those definitions apply to the same activities specified in § 144.030.2.

We disagree. The Missouri Supreme Court, in decisions reaching back over a century, has consistently held that "'every word, clause, sentence, and provision of a statute' must have effect" and that "it will be presumed that the legislature did not insert idle verbiage or superfluous language in a statute."[38] The Director here asks us to find that "processing" and "manufacturing" have the same meaning in § 144.054.2. If we were to accept the Director's

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[34] *Id*. at 3.

[35] 924 S.W.2d 277, 278 n.1 (Mo. banc 1996).

[36] 924 S.W.2d 280, 283 (Mo. banc 1996).

[37] 362 S.W.3d at 5 n.10.

[38] ***Civil Service Comm'n of City of St. Louis v. Members of Bd. of Aldermen of City of St. Louis***, 92 S.W.3d 785, 788 (Mo. banc 2003), *quoting* ***Hyde Park Housing Partnership v. Director of Revenue***, 850 S.W.2d 82, 84 (Mo. banc 1993). For the proposition that every word of a statute must be given effect, see ***Gurley v. Missouri Bd. of Private Investigator Examiners***, 361 S.W.3d 406, 413 (Mo. banc 2012); ***State v. Weatherby***, 168 S.W.2d 1048, 1049 (Mo. 1943)(en banc); ***Morse v. City of Westport***, 19 S.W. 831, 833 (Mo. 1892). For the proposition that the General Assembly does not use superfluous language, see ***Dodd v. Independence Stove & Furnace Co.***, 51 S.W.2d 114, 118 (Mo.1932); *State v. Reeves*, 10 S.W. 841, 845 (Mo. 1889) (applying "the familiar rule which presumes that the legislature, in drafting a statute, employ no superfluous words, or words without a purpose").

position, we would find that the General Assembly used superfluous language by including "processing" in § 144.054.2 and in providing a separate definition for that term.

The Director next argues that the language in ***Civil Service Comm'n*** "provides no support for ignoring the Court's analysis in *Aquila*."[39] The Director then notes, as we found above, that the canon of statutory construction found in ***Civil Service Comm'n*** was used prior to the Court's ***Mid-America Dairymen*** decision. The Director appears to argue the Missouri Supreme Court was aware of the holding in ***Civil Service Comm'n*** when it decided ***Aquila*** and chose not to follow ***Civil Service Comm'n***. Alternatively, the Director argues that the General Assembly has acquiesced in the Missouri Supreme Court's rulings that processing and manufacturing are identical.

We reject both of these arguments. ***Aquila*** does not have the reach the Director suggests. To the contrary, the Court stated in ***Aquila*** that the definitions of "processing" under § 144.030.2 in prior Missouri Supreme Court cases such as ***Hudson Foods*** **and** ***Mid-America Dairymen*** "do not control the statutory definition of 'processing' under" § 144.054.1(1) and .2.[40] Given that the prior definitions do not control, we must use statutory construction to determine the meaning of the word "processing." Cases such as ***Civil Service Comm'n*** show that we must give each word of a statute meaning and presume that the General Assembly does not use superfluous language. If we were to find otherwise, we would find that the Missouri Supreme Court overruled ***Civil Service Comm'n***—and over a century of other cases—*sub silentio* in ***Aquila***. The Missouri Supreme Court presumes, absent a contrary showing, that its opinions have not been overruled *sub silentio*.[41] We likewise will not presume that the Missouri Supreme Court overruled ***Civil***

[39] Resp. Proposed Findings at 17.
[40] 362 S.W.3d at 5 n.10.
[41] *State v. Honeycutt*, -- S.W.3d --, 2013 WL 6188568, *8 (Mo., Nov. 26, 2013) (mandate issued Jan. 9, 2014).

***Service Comm'n*** and many other precedents by a footnote in *Aquila*. We find no showing that the Missouri Supreme Court intended to overrule a century's worth of precedent.

Further, the General Assembly included a separate definition of "processing" in § 144.054.1(1). We thus conclude that the General Assembly intended for "processing" to have a separate and distinct meaning from all the other terms in § 144.014.2, including manufacturing, and did not intend to follow the interpretation of § 144.030 in ***Mid-America Dairymen*** and ***Hudson Foods***. Therefore, we find that "processing" and "manufacturing" are separate terms with separate meanings.

The Director, relying on ***Aquila***, also argues that the General Assembly's use of the terms "manufacturing" and "processing" "conjures up images of manufacturing facilities producing various items by means of mass production rather than paving contractors paving a parking lot or road."[42] In ***Aquila***, the Missouri Supreme Court then held that "[t]he industrial connotations of ["processing" along with "manufacturing," "compounding," "mining," and "producing"] in section 144.054.2 indicate that the legislature did not intend "processing" to include food preparation for retail consumption."[43] We take from ***Aquila*** only that retail food preparation was not "processing" under § 144.054.2. That holding from ***Aquila*** does not help us determine whether asphalt paving is processing, manufacturing, compounding, or producing.

Finally, the Director suggests that the inclusion of the phrase "processing by the producer at the production facility" in § 144.054.1(1) demonstrates that the General Assembly did not intend for § 144.054 to cover paving operations. The Director's own brief, however, contradicts this assertion:

> This phrase was first added to Section 144.030.2(13) in 1996 … to specifically overrule the Court's holding in *Wetterau*, 843 S.W.2d

[42] Resp. Proposed Findings at 18-19.
[43] 362 S.W.3d at 5.

> at 368 (holding that maintaining frozen meat in a frozen state is not processing for purposes of Section 144.030.2(13) because it does not transform or reduce the meat to a different state).[44]

Thus, the Director argues, the General Assembly included this phrase to expand the sales tax exemption in § 144.030.2(13) to overrule a Missouri Supreme Court case, and then in § 144.054.2 to create a new sales tax exemption that operates "in addition to all other exemptions granted under this chapter."[45] We disagree. There is no evidence that the General Assembly included the phrase in order to exclude the creation of asphalt pavement.

III. "Any Product"

The Missouri Supreme Court recognized in ***E & B Granite, Inc., v. Director of Revenue*** that "[t]here is no definition of 'product' in chapter 144."[46] ***E & B Granite*** is the only case in which the Missouri Supreme Court has addressed the term "product" in § 144.054.2. As the parties both rely on ***E & B Granite***, we will set out the facts of that case in detail.

In ***E & B Granite***, the company manufactured granite countertops and installed them in customers' homes. The company claimed a sales tax refund under § 144.054.2. The Director relied on ***International Bus. Mach. Corp. v. Dir. of Revenue*** [47] ("IBM") for the definition of "product" under § 144.030.2(5): "output with a market value [which] can be either tangible personal property or a service."[48] The Director then argued that "tangible personal property" was an essential part of the definition and that the countertops were fixtures on real property—not tangible personal property—and therefore were not "products" under § 144.054.2. The Director also relied on ***Blevins Asphalt Const. Co. v. Director of Revenue*** for the proposition

[44] Resp. Proposed Findings at 16.
[45] § 144.054.2.
[46] 331 S.W.3d 314, 316 (Mo. banc 2011).
[47] 958 S.W.2d 554, 557 (Mo. banc 1998).
[48] *Id*.

that, under § 144.030.2(2), "improvement to real property cannot be 'new personal property … within the meaning of the sales tax."[49] Section 144.030.2(2) exempted from sales tax materials resulting in "new personal property … intended to be sold ultimately for final use or consumption." Section 144.030.2(5) exempted from sales tax replacement machinery, equipment, and parts involved in producing "new personal property … intended to be sold ultimately for final use or consumption."

The Missouri Supreme Court rejected the Director's arguments. The Court stated that ***Blevins*** was distinguishable because that case interpreted § 144.030.2(2), not § 144.054.2, and because ***Blevins*** was decided ten years before § 144.054.2 was passed.

The Court also found that there were two notable differences between § 144.030.2(2) and § 144.054.2. First, § 144.030.2(2) applies to "new personal property … intended to be sold ultimately for final use or consumption" and includes the phrase "new tangible personal property." Neither phrase is included in § 144.054.2, which "broadly applies to 'any product."[50] Second, exemptions under § 144.054.2(2) are "in addition to any state and local tax exemption provided in section 144.030,"[51] thus showing the legislature's intent to provide "additional exemptions not allowed by section 144.030."[52]

Ultimately, the Court held that "section 144.054.2 is broader than 144.030.2(2) and is not restricted by the phrases 'personal property ... sold ultimately for final consumption' and 'tangible personal property.'"[53] The Court further held that "[s]ection 144.054.2 applies to products, whether or not they are eventually affixed to real property."[54] In short, in ***E & B***

[49] 938 S.W.2d 899, 901 (Mo. banc 1997).
[50] ***E & B Granite***, 331 S.W.3d at 317.
[51] *Id*., *quoting* § 144.054.2.
[52] 331 S.W.3d at 317.
[53] *Id*.
[54] *Id*. at 318.

***Granite***, the Missouri Supreme Court created a new definition of "product" for § 144.054.2: "output with a market value."

There is no question the asphalt pavement at issue in this case was an output. The pavement, in the form of parking lots, driveways, and other paved surfaces, was the culmination of a manufacturing, processing, compounding, and producing process. There also is no question that there is a market for asphalt pavement. Fred Weber sold $2,634,362.37 in materials (rock aggregate and hot mix asphalt) to the Paving Contractors between October 2008 and September 2009 for construction of new streets, parking lots, and resurfacing, costs that the Paving Contractors then passed on to the ultimate owners of the asphalt pavement. The asphalt pavement is a product.

The Director relies on ***IBM*** and ***Blevins*** and asks us to hold that the paving here was not a product. The Director's arguments are identical to those made in ***E & B Granite*** and ask us to apply the definition of "product" under § 144.030.2. We are not free to depart from the Missouri Supreme Court's ruling in ***E &B Granite***, which specifically rejected those arguments.

The Director next argues that the Missouri Supreme Court has defined "product" under § 144.054.2 as "an output with a market value, it can be either tangible personal property or a service."[55] We disagree. The Court in ***E & B Granite*** specifically rejected that interpretation. Furthermore, § 144.054 was not enacted until 2007, nine years after the ***IBM*** opinion was released.

The Director then argues that we should rely on ***Aquila*** rather than ***E & B Granite*** to define what a "product" is. We disagree. ***Aquila*** dealt with the definition of "processing." ***E & B Granite*** specifically dealt with the definition of "product." We are required to follow the most

[55] *Id*. at 19, *quoting International Bus. Mach. Corp.*, 958 S.W.2d at 557.

recent decision of the Missouri Supreme Court that is on point. Here, that case is ***E & B Granite.***

Finally, the Director argues that the asphalt pavement is not a product because it is customer-specific, cannot be moved, and it is not valuable to any other person. We disagree. The Missouri Supreme Court held in ***E & B Granite*** that "[§] 144.054.2 applies to products, whether or not they are eventually affixed to real property." The fact that asphalt pavement cannot be moved, that it is permanently affixed to real property, or that it can be designed to customer specifications, does not make it any less of an output with market value. Neither does the fact that asphalt pavement is valuable only to the owner or first user. A large number of products, including writing paper, ink, and paint, are valuable only to the first user. That fact does not make those items any less of a product: an output with market value.

**Summary**

Fred Weber is entitled to a refund of $139,654.62 plus statutory interest.

SO ORDERED on March 13, 2014.

*\s\ Sreenivasa Rao Dandamudi*
SREENIVASA RAO DANDAMUDI
Commissioner